BEFORE the HEARING EXAMINER for the CITY of MONROE

DECISION – REVISED AFTER RECONSIDERATION

FILE NUMBER:	AP2012-01
APPELLANT:	Lowell Anderson *et al.* C/o Lowell Anderson 129 E Rivmont Drive Monroe, WA 98272
RESPONDENT:	Brad Feilberg City of Monroe SEPA Responsible Official 806 W Main Street Monroe, WA 98272
ACTION SPONSOR:	East Monroe Economic Development Group, LLC C/o Joshua Freed 12900 NE 180th Street, Suite 220 Bothell, WA 98011
TYPE OF CASE:	State Environmental Policy Act (SEPA) Appeal: The Final Phased Environmental Impact Statement issued for the East Monroe Comprehensive Plan Amendment and associated rezone is alleged to be inadequate
EXAMINER DECISION:	GRANT appeal: The Final Phased Environmental Impact Statement is inadequate as a matter of law
ISSUED/MAILED:	_____

INTRODUCTION [1]

Lowell Anderson *et al.* (Anderson *et al.*) filed an appeal on May 10, 2012, from the State Environmental Policy Act (SEPA) Final Phased Environmental Impact Statement (FPEIS) issued by the City of Monroe (City) SEPA Responsible Official for the East Monroe Comprehensive Plan Amendment and associated rezone. (Exhibits E3 and E4 [2])

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[1] Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

[2] Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

The subject property consists "of approximately 50 acres of land located north of US 2 near the eastern city limits of the City of Monroe." (Exhibit E2, p. 3)

The Monroe Hearing Examiner (Examiner) convened a prehearing conference on June 6, 2012. The Appellant, Respondent, and Proponent were sent notices of the conference. (Exhibits E8, E9, E11, and E12) The Appellant and the Respondent attended. The prehearing conference is memorialized in Exhibit E13.

The Examiner held an open record hearing on July 19, 2012. The City gave notice of the hearing as required by the Monroe Municipal Code (MMC). (Exhibits E14A and E14B)

Pursuant to Hearing Examiner Rule of Procedure (RoP) 224(c), the Examiner entered the following exhibits into the hearing record at the outset of the hearing:

Exhibit E1:	Determination of Significance and Request for Comments on Scope of Environmental Impact Statement, issued July 21, 2011
Exhibit E2:	FPEIS for the East Monroe Amendment, issued April 23, 2012, with Appendices A – C.12
Exhibit E3:	Appeal/Reconsideration Form, filed May 10, 2012
Exhibit E4:	Appeal letter, filed by Anderson May 10, 2012, with Attachments LA-1 – LA–27
Exhibit E5:	Letter, Appeal Supplement, filed May 22, 2012
Exhibit E6:	Motion to Dismiss, filed May 22, 2012
Exhibit E7:	Memorandum in Support of Motion to Dismiss, filed May 22, 2012
Exhibit E8:	Letter, Examiner to Parties, mailed May 24, 2012
Exhibit E9:	Notice of Prehearing Conference, issued May 24, 2012
Exhibit E10:	Letter, Anderson to Examiner, filed May 24, 2012; copy of Exhibit E5 attached
Exhibit E11:	Letter, Examiner to Parties, re-mailed May 30, 2012
Exhibit E12:	Re-Mailed Notice of Prehearing Conference, issued May 24, 2012; re-mailed May 30, 2012
Exhibit E13:	Consolidated Order Acknowledging Withdrawal of Motion and Order Memorializing a Prehearing Conference, issued June 7, 2012

During the hearing the Examiner accepted and entered additional exhibits as follows:

Exhibit E14A:	Affidavit of Publication – Notice of Application and Public Hearing
Exhibit E14B:	Affidavit of Mailing - Notice of Application and Public Hearing to property owners within a 500 foot radius and parties of record

Exhibit E15:	Letter from Futurewise to Hearing Examiner, received July 12, 2012 (dated June 12, 2012), with attachments [3]
Exhibit E15.1:	Letter from Futurewise to Mayor Zimmerman, dated June 10, 2012 [4]
Exhibit E15.2:	US 2 Safety Coalition, 2007 Legislative Agenda with supporting documents
Exhibit E15.3:	Letter to Joshua Freed from City of Monroe, dated September 20,2010
Exhibit E15.4:	Letter from WSDOT to Hiller West, dated March 3, 2004
Exhibit E15.5:	Letter from DOE to Brad Feilberg, dated August 19, 2011
Exhibit E15.6:	Letter from WSDOT to Brad Feilberg, dated August 18, 2011
Exhibit E15.7:	Letter from DOE to Joan Cook re: SEPA comments, dated March 13, 2012
Exhibit E15.8:	Letter from DOE to Mayor Zimmerman, dated June 10, 2010
Exhibit E15.9:	Planning Commissioner meeting coversheet re: CPA2011-01
Exhibit E15.10:	Letter to Robert & Sandra Kruetz from Kate Galloway, Senior Planner, dated May 18, 2008
Exhibit E15.11:	Monroe City Council coversheet re: CPA2006-C budget amendment
Exhibit E15.12:	Memo to Mayor Walser and City Council from Kate Galloway, dated March 22, 2006
Exhibit E15.13:	U.S. 2 – Fix It Now!, US2 Safety Coalition report
Exhibit E15.14:	US 2 Traffic Safety Corridor - Collision Data, last updated 4/23/08

Respondent City did not pre-file any exhibits. Pursuant to RoP 224(i), during the hearing the Examiner accepted and entered the following exhibit from Respondent City:

Exhibit M1:	Brad Feilberg's hearing statement

Pursuant to RoP 224(e), Appellant Anderson *et al.* pre-filed Exhibits A1 – A11. Respondent City objected to entry of Exhibit A10. After hearing brief argument on the objection, the Examiner overruled the objection and entered pre-filed Exhibits A1 – A11 into the hearing record:

Exhibit A1:	Monroe Municipal Code Chapter (MMC) 14.01 – Flood Hazard Regulations
Exhibit A2:	Map of Snohomish County Flood History
Exhibit A3:	Annual Peak River Stages @ Snohomish Gage
Exhibit A4:	FEMA Flood Profiles
Exhibit A5:	Email from WSDOT with drawings
Exhibit A6:	Wallace Properties market advertisement for property

[3] According to the first full paragraph on page 2 of this letter, the City Council acted on the proposed comprehensive plan amendment "two days ago." Testimony during the hearing indicated that the City Council's action occurred on July 10th. Therefore, the Examiner believes that the month in the date on this letter is a scrivener's error: It most likely was written in "July," not "June."

[4] According to Exhibit E15, this letter was submitted to the City "Two days ago." (Exhibit E15, p. 1, ¶4) Therefore, the same scrivener's error likely occurred with the date on this letter.

Exhibit A7:	Copy of MMC 14.01.150 Floodways
Exhibit A8:	Wetland Resources Inc., project site description
Exhibit A9:	Letter to Mayor Zimmerman from Tualco Grange president, dated August 11, 2010
Exhibit A10:	Memorandum from Mitch Ruth to Hearing Examiner, dated July 5, 2012
Exhibit A11:	Appellants' Brief in Support of Appeal

Pursuant to RoP 224(i), during the hearing the Examiner accepted and entered the following exhibits from Appellant Anderson *et al.*:

Exhibit A12:	Power Point hearing presentation (CD submitted)
Exhibit A13:	Lowell Anderson's hearing statement

The City has the record copy of the exhibits.

The action taken herein and the requirements, limitations and/or conditions recommended for imposition by this recommendation are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take and recommend pursuant to applicable law and policy.

FINDINGS OF FACT

1. The subject property consists of a portion of five parcels and the entirety of a sixth parcel on the north side of US 2 near the eastern City limits. The six parcels are identified within the FPEIS as Lots A - F. The six parcels together encompass approximately 68 acres. (Exhibit E2, p. 4, Table 1) During the comprehensive plan amendment docketing process, the "City Council removed the portions of Lots A – E that fall within the shoreline jurisdiction boundary resulting in a project area of 50.36 acres". (Exhibit E2, p. 3) The approximate 50 acres will hereinafter be referred to as the "Project Area." [5]

   Lots A – E contain 42.81 acres and are owned by the Heritage Baptist Fellowship (Heritage Baptist); Lot F contains 25.30 acres and is owned by Robert and Sandra Kreutz. (Exhibits E2 {Table 1, p. 4} and E4LA-15) Lots B – E were created by short subdivision in or around 2004. (Exhibits E4LA-18 and E4LA-19) The East Monroe Economic Development Group, LLC (EMEDG) does not own any of the Project Area. (Testimony)

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[5] Table 1 in Exhibit E2 (p. 4) contains area figures, presented at two decimal places, for the gross area, area in the Preferred Alternative, and area within a Reduced Scope Alternative for each lot. The total for the Preferred Alternative is 50.23 acres. The difference between that figure and the 50.36 acres as stated elsewhere within the FPEIS is not explained in the record but is so small as to be *de minimis*.

2. Heritage Baptist sought a comprehensive plan amendment for its property in 2004. That request was not placed on the 2005 docket but eventually became part of a slightly larger sub-area plan docketed by the City Council in 2006. (Exhibits E15.9 and E15.12) The City Council opted not to proceed with analysis of that request due to budget considerations. (Exhibit E15.10)

3. In the summer of 2010, EMEDG filed an application with the City seeking a comprehensive plan amendment and rezone [6] to change the designation and zoning of Lots A - F from Limited Open Space (LOS) to General Commercial (GC). The City Council placed a reduced scale version of the request (the Project Area) on the City's comprehensive plan amendment docket in the Fall of 2010. The Respondent issued a SEPA Determination of Significance (DS) for the docketed action in July, 2011. Subsequent thereto, the Respondent decided to proceed with phased environmental review. A Draft Phased EIS was issued in February, 2012, and the FPEIS which is the subject of this appeal was issued on April 23, 2012. (Exhibits E2 {pp. 3 & 4}, E7 {p. 2}, and M1 and testimony) Anderson *et al.* filed their appeal on May 10, 2012. (Exhibits E3 and E4) Anderson *et al.* filed an appeal supplement on May 22, 2012. (Exhibit E5)

4. On July 10, 2012, the City Council adopted an ordinance to amend the comprehensive plan land use designation from LOS to GC along with related textual plan changes for the docketed Project Area. Action on the accompanying rezone was delayed for reasons not stated during the Examiner's hearing. (Exhibit E15 {p. 2} and testimony)

5. A steep (> 40%), approximately 100 – 120 foot high south aspect slope borders Lots A – F to the west and north, extending onto the northern edges of Lots A – D. In addition to containing the toe of the abutting steep slope, Lots A – F exhibit three distinct topographies: A lower pasture, a slough corridor, and an upper terrace. The majority of Lots A - F is relatively flat. An oxbow slough, once a channel of the nearby Skykomish River, arcs through the site passing through Lots A – E. The slough passes beneath abutting US 2 in a large culvert at each end of the oxbow. The lower pasture covers most of Lots A – E. The upper terrace is limited to a portion of Lot D (and perhaps also the northern portion of Lot F; no topographic information is available in the record for Lot F). (Exhibits A8, E2 {pp. 7 and 18}, E4LA-16, and E4LA-20)

   Lots A – F are covered by one or more critical areas regulated under Chapter 20.05 MMC: Wetlands, flood-prone lands, steep slopes, and the slough. (Exhibits E4LA-16 and E4LA-17 and testimony) The portion of the oxbow slough within Lots A – C is within the mapped jurisdictional area of the Shoreline Management Act (SMA); the remainder of the oxbow slough is not. (Testimony) The

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[6] The rezone is described throughout the record as "a concomitant rezone." (See, for example, Exhibit E2, p. 3) Feilberg testified that he used the word "concomitant" to express the thought that a rezone from LOS to GC accompanied the comprehensive plan amendment. The term "concomitant rezone agreement" is often used in the land use regulatory system to refer to a rezone accompanied by a binding, contractual agreement of some sort. Feilberg did not use the word "concomitant" in that sense; a binding, contractual agreement is not part of the proposal. (Testimony)

Department of Ecology (DOE) believes that some of the wetlands outside of the SMA-mapped area on the Lots may be "associated" wetlands, also under SMA jurisdiction. (Exhibit E4LA-2, p. 2)

6. The 2004 short subdivision resulted in the imposition of an extensive Native Growth Protection Area (NGPA) across Lots B – E, basically following the oxbow slough and associated wetlands. (Exhibit E4LA-19) The NGPA areas must "remain undisturbed in perpetuity." (Exhibit E4LA-18, Note 1) Since that short subdivision did not involve either Lot A or Lot F, there are presently (according to the record in this appeal) no NGPAs applicable to either of those lots.

   Since the Project Area excludes that portion of the lots within the mapped SMA jurisdiction, the NGPA areas on Lots B and C lie outside of the Project Area while the NGPA areas on Lots D and E lie within the Project Area.

7. Lots A – F are zoned LOS. (Exhibit E4LA-14) The Project Area has historically been primarily used for agriculture. (Exhibit E2, p. 19) Crops have been recently grown on the lots. (Exhibit E15.1, p. 6) Lot F contains both agricultural land and five single-family residences. (Exhibit E2, p. 19)

   The adjoining steep bluff is wooded. (Exhibit E2, p. 6, Figure 3)

   The area on the ridge at the top of the bluff is zoned R3-5 and fully developed with single-family residences. (Exhibits E2 {p.6, Figure 3} and E4LA-14)

   The Project Area is about three-quarters of a mile east of the commercial area of Monroe, separated from that area by the intervening ridge. (Exhibit A6)

8. The DS identified three alternatives and 11 elements of the environment to be addressed in the EIS. The three alternatives were: No action; Limited redesignation (deleting everything subject to SMA jurisdiction or subject to critical areas regulations); and Full redesignation (deleting only the SMA jurisdictional area). (Exhibit E1)

   The elements of the environment listed in the DS which needed to be covered in the EIS were: Earth; Water, surface; Water, ground; Animals; Noise; Land and shoreline use; Aesthetics; Light and glare; Transportation; Public services; and Utilities. (Exhibit E1)

   The DS was not appealed. (Testimony)

9. The 30-page FPEIS contains a section addressing alternatives and sections addressing each of the eleven environmental elements listed in the DS. (Exhibit E2) The basic philosophy underlying the FPEIS is stated first in the FPEIS's cover letter and then repeated in the Summary:

> This action in and of itself does not have any environmental impacts. However, as this action is the first in an anticipated series of related actions this proposed action is being reviewed with a phased environmental impact statement. Future development within the project area will be required to supplement or amend this phased environmental impact statement when more specific development actions are proposed.

(Exhibit E2, unpaginated cover letter and p. 1, respectively)

The FPEIS's Fact Sheet states "The City expects that additional environmental review will be required at such time when specific proposals are made for development. No dates are known or committed at this time." (Exhibit E2, p. ii)

The statement that the action will not itself result in any impacts is repeated in every section of the FPEIS. (Exhibit E2, pp. 1, 2, 4, 10, 12, 15, 17, 18, 24, 25, 26, 27, 28, and 29)

The "Mitigating Measures" section for each environmental element addressed in the FPEIS contains the following statement:

> All development not allowed in the current land use designation and zoning classification will not be allowed to be categorically exempt and will have to undergo further environmental review.

(Exhibit E2, pp. 11, 13, 15, 17, 18, 24, 25, 26, 27, and 29)

10. The FPEIS states that the purpose of the proposed action, "[a]ccording to the project proponent, … is to allow for the commercial development of the subject property in order to bring valuable economic development to the City of Monroe." (Exhibit E2, p. 5) The Respondent testified that any alternative must result in the Project Area being zoned GC.

The FPEIS identifies two alternatives to the redesignation of the 50 acre Project Area. The No Action Alternative would leave the Project Area designated and zoned LOS. The Reduced Scope Alternative would reduce from 50 to 23 the number of acres to be redesignated from LOS to GC by eliminating those portions of Lots A – F "located in a native growth protection area, wetland, stream, or critical area buffer". (Exhibit E2, p. 5; see Table 1 on p. 4)

The FPEIS summarily dismisses the Reduced Scope Alternative "[s]ince the environmental impacts of this alternative are not materially different from the impacts of the proposed action". (Exhibit E2, p. 5)

11. The "Earth" section acknowledges "a history of landslides occurring on the slope in the recent past". It states that the slope is a regulated landslide hazard area, and "is also potentially unstable because of rapid stream incision or stream bank erosion associated with the slough located near the base of the slope." (Exhibit E2, p. 10, both quotes) Other evidence and testimony support those statements. (Exhibit E2C.3 {p. 2} and E2C.8 {p. 3} and testimony) The FPEIS states that future development "could increase stream flow adjacent to the northerly ridge." (Exhibit E2, p. 10) No analysis of the impact of such increased flow is contained within the FPEIS.

12. The "Water, Ground" section notes that the Project Area lacks both municipal water and sewer service. It states that future commercial development might withdraw ground water and utilize on-site sewage disposal or might extend municipal services to the Project Area. (Exhibit E2, pp. 12 and 13) No analysis of either option is contained within the FPEIS.

13. The "Water, Surface" section acknowledges the existence of wetlands in the Project Area. The FPEIS identifies a conflict in the classification of the wetlands, but does not resolve that conflict. (Exhibit E2, p. 13) DOE's comment on the Draft EIS states that the wetland classification is incorrect. (Exhibit E2C.4) The FPEIS responded that "as this is a phased EIS the fact that wetlands and other critical areas exist on the property is sufficient at this time. When a specific development proposal is received further environmental review, including compliance with critical area regulations, will be required." (*Ibid.*)

The Project Area is subject to frequent flood inundation. (Exhibits A13 and E4LA20 – LA27 and testimony)

The FPEIS states that the Project Area is subject to a Federal Emergency Management Agency (FEMA) National Flood Insurance Rate Map (FIRM) dated from September, 1999, which rates the area as "Shaded X" meaning it is within the "500-year" flood plain, or within a portion of the 100-year flood plain which would be inundated to a depth of less than one foot, or is an area protected by levees from the 100-year flood. (Exhibit E2, p. 14)

Section 14.01.050 MMC states that the applicable FEMA flood study "with accompanying" FIRMs is dated September 2005 "and any revisions thereto." (Exhibit A1) The 2005 FIRM is not in the record. One of the appellants asserted in a comment on the Draft EIS that the 2005 FIRM places the property in flood Zone AE with a base flood elevation of 66 – 68 feet across the Project Area. (Exhibit E2C.8, p. 2) A "Preliminary" FIRM dating from 2007 places the property in flood Zone AE with a base flood elevation of 66 – 68 feet across the Project Area. (Exhibit E4LA-27) If the base flood elevation is 66 – 68 feet, the entire lower pasture area, the majority of the Project Area, would be inundated by five to eight feet of water on average during a 100-year flood event. (Exhibit E4LA-20) The FPEIS states that adoption of the 2007 FIRM "has been delayed due to concerns of whether non-certified levees can be used to remove floodplain areas from a special flood hazard area."

(Exhibit E2, p. 14) Anderson *et al.* assert that the conflicts delaying adoption of the newer FIRM have nothing to do with the Project Area. (Exhibit E4LA-4, p. 2)

The FPEIS states that future filling of the site could adversely affect the wetlands and displace flood waters. (Exhibit E2, p. 15) No analysis of those impacts is contained within the FPEIS, nor does the FPEIS analyze the effect of floodwater displacement on stability of the adjacent slope or downstream properties in the Skykomish River valley.

14. The "Noise" section notes that "additional noise [may be generated] during construction activities." (Exhibit E2, p. 18) It also states that "a slight increase in background noise during operation" is expected. (Exhibit E2, p. 19) The FPEIS does not attempt to quantify these noise levels. The "slight increase" statement is based upon the Respondent's experience with existing commercial uses within the City. (Testimony)

The "Mitigating Measures" section states that noise levels are regulated by MMC 18.10.270 and Chapter 173-60 WAC. (Exhibit E2, p. 18) The FPEIS contains no discussion of the standards established by those regulations.

15. The "Land & Shoreline Use" section lists the differences in permitted and conditional uses in the LOS and GC zones. (Exhibit E2, pp. 20 – 23, Table 2) The LOS zone allows mostly rural, school, single-family residential, and certain Essential Public Facility (EPF) uses. The GC zone allows school, health, industrial, retail commercial, service, and basically the same EPF uses. The GC zone allows more dense development with no minimum lot size. (Exhibit E2, p. 23, Table 3) Some uses allowed in the LOS zone but not in the GC zone could not occur on the Project Area as a practical reality: For example, the site is too small and bordered by too high a bluff for an airport; there are no minerals on the property to excavate.

DOE commented on the Draft EIS that the wetland on Lots D – F "is an associated wetland within shoreline jurisdiction." (Exhibit E2C.4, p. 2) DOE referenced WAC 173-22-030 in support of that statement. (*Ibid.*, Footnote 1) Subsection 173-22-030(1) WAC defines "associated wetland" as "those wetlands which are in proximity to and either influence or are influenced by tidal waters or a lake or stream subject to the Shoreline Management Act". Section 173-22-055 WAC provides the mechanism to resolve conflicts between adopted designations and real-world conditions:

> In the event that any of the shoreland designations shown on the maps adopted in WAC 173-22-060 or a shoreline master program approved under WAC 173-22-050, conflict with the criteria set forth in this chapter the criteria shall control. The boundary of the designated shoreland areas shall be governed by the criteria set forth in WAC 173-22-040 except that the local government must amend the local master program to reflect the new designation within three years of the discovery of the discrepancy.

One of the shoreland designation criteria applicable to rivers is "[t]hose wetlands which are in proximity to and either influence or are influenced by the stream. This influence includes but is not limited to one or more of the following: Periodic inundation; location within a flood plain; or hydraulic continuity". [WAC 173-22-040(3)(c)]

The FPEIS responded to DOE's comment by stating that shoreline jurisdiction areas as designated in the DOE-approved Monroe Shoreline Master Program have been excluded from the Project Area. (Exhibit E2C.4, p. 2)

The FPEIS states that redesignation and changing the zoning to GC would result in "Possible changes in the character of land use." (Exhibit E2, p. 24)

16. The "Transportation" section states that US 2 carries 19,000 vehicles "in both directions" and that the five single-family residences on Lot F "generate an estimated 47 trip ends per day". (Exhibit E2, p. 25) The FPEIS also states that "[t]his section of US 2 also has a significant history of motor vehicle collisions." (*Ibid.*)

The FPEIS states that four additional single-family residences and a 600 seat church could be built on the site under current zoning. The FPEIS estimates that such development would add 45 p.m. peak hour trips and "up to 935 trips on Sunday" to US 2. (Exhibit E2, p. 27) The FPEIS estimates that "a 150,000 square foot discount club" would represent the high end of site development under GC zoning and would generate 6,270 average daily trip ends with 8,000 trip ends on an average Saturday. (Exhibit E2, p. 26) Respondent testified that such a store probably represented the maximum development for the entire Project Area after consideration of NGPA restrictions and parking requirements. It is unclear whether that testimony applied to the entire Project Area or just to the Heritage Baptist property: None of Kreutz's 25 acre Lot F is encumbered by NGPAs.

The Project Area is essentially at the east end of the Washington State Department of Transportation's (WSDOT) planned US 2 Monroe Bypass. WSDOT plans to terminate the east end of the Bypass with a roundabout. (Exhibits E15.2 and E15.13) "WSDOT purchased the access rights to the Heritage Baptist Fellowship parcels in 1971". (Exhibit E4LA-7, p. 1) WSDOT will allow only a temporary access to those parcels pending construction of the Monroe Bypass. (*Ibid.*)

The FPEIS lists as mitigation measures seven requirements taken from three WSDOT comment letters regarding access limitations affecting the Project Area. (Exhibit E2, pp. 26 and 27) Items 1, 2, and 4 – 6 are from an August 2011 WSDOT letter responding to issuance of the DS; item 3 is from a March 2004 letter regarding the Heritage Baptist short subdivision; and item 7 is from a March 2012 Draft EIS comment letter. (See Exhibit E2C.10, August 2011 letter; Exhibit E4LA-7; and Exhibit E2C.10, March 2012 letter, respectively.) The listed mitigation measures mention the access restriction and essentially state that a single access point to the Project Area will be required, that the

access point will most likely have to be a roundabout, and that the spacing between the Bypass's terminal roundabout and the site's access roundabout must be at least one-quarter mile. (Exhibit E2, pp. 26 and 27)

The FPEIS does not include the requirement in WSDOT's March 2004 letter that "the City of Monroe shall be responsible for the construction of the FR 14 Line frontage road" if it allows "greater density beyond the 4-lot short plat". (Exhibit E4LA-7, p. 1)

Other than the numbers provided in the first paragraph of this Finding of Fact, the FPEIS does not quantify traffic facts regarding US 2. (Exhibit E2, pp. 25 – 27) The FPEIS states only that future development under the GC zone "may increase the number of cars entering and exiting US 2 from the Project Area." (Exhibit E2, p. 26)

Detailed US 2 collision data was provided by Futurewise/Pilchuck Audubon Society (Futurewise) in its hearing submittal. (Exhibits E15.1 and E15.14) The latter exhibit includes detailed accident information by highway mile post. The average daily traffic volume on US 2 through the City was over 40,000 vehicles in 2007. (Exhibit E15.13, US 2 Route Development Plan, Monroe Bypass Phase I) The average daily traffic volume on US 2 in 2006 between Monroe and Gold Bar was 15,500 vehicles. (Exhibit E15.14, unpaginated page 22)

The City does not known exactly where the WSDOT roundabout at the east end of the Bypass would be located, so it cannot say where on the Project Area's frontage a site access roundabout could be located. (Testimony)

The Comprehensive Plan contains the City's adopted concurrency standards for arterial roadways. [MMC 20.06.030(K)(6)] Level of Service standards for state routes are set by the state; US 2 is a state highway. [Comprehensive Plan, p. TR-3] US 2 is classified as a Principal Arterial. [Comprehensive Plan, Figure TR-1] It is also "identified as a Highway of Statewide Significance". [Comprehensive Plan, p. TR-10] The adopted Level of Service for "state highway segments" is "D." [Comprehensive Plan, p. TR-27, Policy TP9] Since the Level of Service on area state highways exceeded the established standard when the Transportation Element was amended in 1998, the Comprehensive Plan included an agreement between WSDOT and the City regarding mitigation requirements where a lower Level of Service exists or would be created by a new development. [Comprehensive Plan, pp. TR-31 and TR-32] The FPEIS does not mention the Level of Service standard and contains no discussion or analysis of US 2 Level of Service conditions.

17. Anderson *et al.* and Futurewise contend that the City has avoided any meaningful analysis of environmental impacts associated with the comprehensive plan amendment and rezone from LOS to GC. They contend that the changes will "open the door to a wide-range of development possibilities and uses for the subject property which would have a profound and irrevocable impact." (Exhibit E4LA-1, p. 1) They responded to the Draft EIS with a petition asking the City to prepare a "full" EIS

now rather than a phased EIS. (Exhibit E2C.7) They contend that the plan and zone changes "commit the City of Monroe to" greatly expanded uses in the Project Area. (Exhibit E5, p. 1) They assert that the City is merely postponing meaningful environmental evaluation. (Exhibit E5, p. 2) They argue that the City "is trying to bypass the intent of SEPA in order to allow commercial development to go forward." (Exhibit E15, p. 2) Finally, they contend that the City has misused both the phased SEPA review process and the nonproject EIS guidelines. (Exhibit E15 *et al.* and testimony)

18. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK [7]

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority
The Examiner has authority "[to] hear all appeals of State Environmental Policy Act threshold determinations/EIS adequacy". [MMC 21.20.050(I)] The Examiner conducts an open record hearing on the appeal and issues a decision which is final subject to the right of reconsideration and appeal to Superior Court. [MMC 20.04.210, 21.50.080, and 21.50.120]

Review Criteria
SEPA is generally described as having two separate aspects: The procedural and the substantive. A challenge to the adequacy of an FEIS involves the procedural aspect of SEPA. Conditioning a project under authority of SEPA involves the substantive aspect of SEPA.

The procedural aspect of SEPA requires that a determination be made as to whether a project would result in "a probable significant, adverse environmental impact" and requires that a "detailed statement" be prepared in conjunction with "major actions significantly affecting the quality of the environment". [RCW 43.21C.031 and RCW 43.21C.030(c), respectively] The process of determining whether a project would result in such an impact is referred to as the "threshold determination" process. The person making the determination is called the "responsible official".

A. The State has adopted rules under the authority of Chapter 43.21C RCW with which all local SEPA regulations and procedures must be consistent. Monroe has adopted its own set of SEPA procedures [Chapter 20.04 MMC] which incorporate a number of the state rules by reference.

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[7] Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

B. The "detailed statement" required by SEPA is commonly referred to as an EIS and is required to "be prepared on ... major actions having a probable significant, adverse environmental impact." [RCW 43.21C.031]

C. The State rules define "probable" as something which is "likely or reasonably likely to occur" as opposed to events "that merely have a possibility of occurring, but are remote or speculative." [WAC 197-11-782] The term "significant" "as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality." [WAC 197-11-794, both definitions adopted by reference at MMC 20.04.220]

D. The threshold determination process results in either a Determination of Significance (DS) or a Determination of Nonsignificance (DNS). [WAC 197-11-340 and -360, adopted by reference at MMC 20.04.080] A DS is issued when the responsible official concludes that the proposal will have a probable, significant adverse impact on the environment.

E. After issuance of a DS, an EIS is prepared to "provide impartial discussion of significant environmental impacts and [to] inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality." [WAC 197-11-400(2), adopted by reference at MMC 20.04.130]

F. The Final EIS "shall accompany proposals through existing agency review processes ... so that agency officials use [it] in making decisions." [WAC 197-11-655(2), adopted by reference at MMC 20.04.190]

Vested Rights

The vested rights doctrine has no direct bearing on the adequacy of an FEIS.

Standard of Review

Appellate courts have established the standard of review for a challenge to the adequacy of an FEIS.

> We review an EIS's "adequacy"--i.e., the legal sufficiency of the environmental data in the EIS--de novo. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 183, 979 P.2d 374 (1999); *Klickitat Cnty. Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390, 866 P.2d 1256 (1993). We assess the EIS's adequacy under "the rule of reason." *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 361, 894 P.2d 1300 (1995). An EIS is adequate under the rule of reason when it presents decision makers with a " 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.' " *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 311, 197 P.3d 1153 (2008) (internal quotation marks omitted) (quoting *Klickitat Cnty. Citizens Against Imported Waste*, 122 Wn.2d at 633). We accord substantial weight to an agency's

> determination of EIS adequacy. *See* RCW 43.21C.090; *accord King County*, 138 Wn.2d at 183.

[*Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 480, 245 P.3d 789 (2011); footnote omitted]

The appellant has the burden of proof. Both state rule [WAC 197-11-680(3)(a)(viii)] and municipal code [MMC 20.04.210(C)] "provide that procedural determinations made by the responsible official shall be entitled to substantial weight" during any appeal proceeding.

Scope of Consideration
The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The question before the Examiner in this appeal is whether the FPEIS for the East Monroe Comprehensive Plan Amendment and associated rezone is inadequate as a matter of law. The question before the Examiner is not whether the Comprehensive Plan Amendment and associated rezone are good, bad, or indifferent policy actions. The latter question is a legislative issue within (at the local level) the City Council's purview. As the State Supreme Court has said, "We do not rule on the wisdom of the proposed development but rather on whether the FEIS gave the city council sufficient information to make a reasoned decision." [*Citizens Alliance v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995)]

2. The FPEIS for the East Monroe Comprehensive Plan Amendment and associated rezone is inadequate as a matter of law under the rule of reason standard. Basically, the FPEIS provides no analysis of environmental impact; all impact analysis is put off until specific development proposals are put forth in the future. The FPEIS does not give "the city council sufficient information to make a reasoned decision" as it contains no analysis and considers no alternatives to changing the comprehensive plan designation from LOS to GC. The FPEIS does not contain the required "reasonably thorough discussion of the significant aspects of the probable environmental consequences." [*Klickitat Cnty. Citizens Against Imported Waste*, 122 Wn.2d at 633]

3. SEPA requires that the City evaluate

> direct and indirect impacts caused by a proposal. … For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects or extension of sewer lines would tend to encourage development in previously unsewered areas.

[WAC 197-11-060(4)(d), adopted by reference at MMC 20.04.020] An EIS must consider direct, indirect, and cumulative impacts. [WAC 197-11-060(4)(e) and WAC 197-11-792, adopted by reference at MMC 20.04.020 and .220, respectively] The FPEIS ignores indirect impacts and cumulative impacts.

4. Chapter 197-11 WAC divides actions into two categories: Project and nonproject. Amendment of a comprehensive plan and adoption of zoning for the area involved in such an amendment is a nonproject action. [See WAC 197-11-774, adopted by reference at MMC 20.04.220.] The EIS requirements for a nonproject action are different from those for a project action. Sections 197-11-402, -406, -408, -410, -420, -425, -430, -435, -440, -448, and -460 WAC apply to both project and nonproject EISs. (All cited sections adopted by reference at MMC 20.04.130.)

Section 197-11-442 WAC (also adopted by reference at MMC 20.04.130) provides additional guidance for nonproject EISs. A nonproject EIS

> shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal. Alternatives should be emphasized. ... Alternatives including the proposed action should be analyzed at a roughly comparable level of detail, sufficient to evaluate their comparative merits ....

[WAC 197-11-442(2)]

> The EIS's discussion of alternatives for a comprehensive plan, community plan, or other areawide zoning or for shoreline or land use plans shall be limited to a general discussion of the impacts of alternate proposals for policies contained in such plans, for land use or shoreline designations, and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures but should cover a range of such topics. The EIS content may be limited to a discussion of alternatives which have been formally proposed or which are, while not formally proposed, reasonably related to the proposed action.

[WAC 197-11-442(4)] This requirement is significantly different from that applicable to a project EIS where alternatives are limited to "actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." [WAC 197-11-440(5)]

5. The FPEIS fails to consider any meaningful alternatives to redesignation of the Project Area from LOS to GC. "The range of alternatives considered in an EIS must be sufficient to permit a reasoned choice." [*SWAP v. Okanogan Cty.*, 66 Wn. App. 439, 444, 832 P.2d 503 (1992); citations omitted] This is a City policy action, not a proposed private development. That EMEDG requested that the

City consider the comprehensive plan and zoning amendment does not change the proposal into a private project. For the FPEIS to be adequate, the City must consider alternative designations for the Project Area and/or alternative locations within the City for additional GC development. [*Citizens Alliance* at 365] The notion that rezone of the Project Area to GC is the goal and, therefore, no other alternatives would achieve that goal, simply does not apply in a nonproject, policy action such as that here.

Further, the so-called Reduced Scope Alternative is no alternative at all. The areas within Lots A – F that would be removed from the proposal under this alternative are only those areas that would be significantly restricted from development under the City's critical areas regulations, no matter what they are zoned: They wouldn't be any more or any less developed under the Preferred Alternative. The two alternatives offer exactly the same vision for future development of Lots A – F.

6. "A nonproject proposal may be approved based on an EIS assessing its broad impacts." [WAC 197-11-443(2), adopted by reference at MMC 20.04.130] Here, the FPEIS simply fails to assess any impacts, broad or otherwise. It states over and over that the redesignation in and of itself generates no impacts. It systematically puts off to the future any consideration of impacts. It fails to recognize that changing the designation and zoning from LOS to GC will inevitably lead to a significant increase in the intensity and type of development that can occur in the Project Area. Changing the designation and zoning does generate impacts simply by making a much wider range of intensive uses allowable in the Project Area. To be adequate, the FPEIS must provide an analysis of the "broad impacts" associated with that change. The FPEIS does not.

7. Phased SEPA review is allowed in certain circumstances. [WAC 197-11-060(5), adopted by reference at MMC 20.04.020] "Phased review is appropriate when: (i) The sequence is from a nonproject document to a document of narrower scope such as a site specific analysis". [WAC 197-11-060(5)(c)]

> Phased review is not appropriate when: … (ii) It would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts; or (iii) It would segment and avoid present consideration of proposals and their impacts that are required to be evaluated in a single environmental document under WAC 197-11-060(3)(b) or 197-11-305(1); however, the level of detail and type of environmental review may vary with the nature and timing of proposals and their component parts.

In theory, phased review could be appropriate here: Broad analysis of impacts associated with the redesignation would be followed in due course by more detailed analysis of the impacts associated with specific development proposals for portions of the Project Area, whatever they might be. But that would still not remove the obligation to provide broad impact analysis in this FPEIS. As previously stated, such analysis is completely lacking in this FPEIS.

8. A further problem here is that the process likely has avoided any consideration of cumulative impacts. The oft-repeated statement in the FPEIS that "All development not allowed in the current land use designation and zoning classification ... will have to undergo further environmental review" (See Exhibit E2, p. 11 *et al.*) offers no certainty that cumulative impacts will ever be analyzed under SEPA. Cumulative impacts must be evaluated in an EIS; cumulative impacts are not analyzed in a threshold determination leading to a DNS or a Mitigated DNS. [WAC 197-11-060(4)(e), -330(2), and -330(3)] The threshold determination for small developments within the Project Area may legitimately result in issuance of DNSs. [8] Nothing in this FPEIS can change the content of the SEPA regulations.

9. In the context of an EIS, the reality of flooding is more important than which regulatory requirements may apply. The Responsible Official has an obligation to use the best available science to identify the extent to which the Project Area is subject to flood inundation, regardless of what FIRM is legally applicable. The best available evidence is that the majority of the developable portion of the Project Area is subject to up to about eight feet of flood inundation during the 100-year flood event; the best available science is that US 2 does not function as a levee to protect the Project Area from flood inundation (it is punctured by two, three-foot-plus culverts associated with the oxbow slough). GC development of the site will in all likelihood require much more fill than would continuation of the LOS designation (notwithstanding that Heritage Baptist apparently may have at one time considered constructing a church somewhere on Lots A – E). Commercial developments that would logically locate along an arterial highway are usually land extensive and would want to maximize use of the available, non-NGPA-restricted portions of the site. That would require fill – lots of fill. The FPEIS is inadequate as a matter of law for failing to include any analysis of the impact of extensive filling of the Project Area.

10. The Land & Shoreline Use section of the FPEIS is inadequate as a matter of law for failing to include any consideration of alternative land use designations for the Project Area.

11. It is likely, given the evidence in the record, that the portion of Lots A – F subject to SMA jurisdiction is greater than the area excluded when the Project Area was chosen. In other words, some unknown portion of the Project Area is apparently also subject to SMA regulation pursuant to WAC 173-22-055. The FPEIS is inadequate as a matter of law for not resolving this issue.

12. The Transportation section of the FPEIS is inadequate as a matter of law for failing to provide any analysis of traffic impacts associated with the proposed redesignation. The Transportation section is remarkable for its near complete absence of data regarding traffic conditions, probable generation rates under reasonable GC scenarios, and impacts. The FPEIS fails to even mention the Level of

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[8] The City's suggestion in testimony that preparation of a critical areas study under Chapter 20.05 MMC would be the functional equivalent of additional SEPA review is not persuasive. The range of elements of the environment that are required to be evaluated under SEPA is vastly broader than the range of considerations under Chapter 20.05 MMC.

Service standards contained in the adopted comprehensive plan, let alone discuss how the redesignation to GC would affect compliance with the established Level of Service. The FPEIS provides the decision maker with no insight into the likely traffic impacts of the proposed redesignation.

The "Mitigating Measures" in the FPEIS are merely a compilation of most of WSDOT's requirements for development along this segment of US 2 – the access rights to most of which WSDOT has previously purchased. The FPEIS fails to even depict or describe the location and alignment of the "FR 14 Line" frontage road, which seems to be a key element of WSDOT's requirements. The trip generation example for a single "discount club" store seems to be misleading: All 25 acres of Parcel F are included within the Project Area and none of those acres are presently encumbered by NGPAs. It is unreasonable to believe (without convincing evidence of which there is none in the record) that the non-NGPA portion of Lots A – E and the entirety of Lot F could be developed with one and only one store.

13. Suffice it to say, the sections of the FPEIS not discussed in detail within this Decision are as profoundly lacking in environmental analysis as are the sections discussed herein. However, since Anderson *et al.* did not focus on them, they will not be addressed further here.

14. Futurewise's hearing submittal quotes from and provides a link to DOE's on-line SEPA Handbook. (Exhibit E15, p. 3) Portions of the Handbook are particularly apropos.

SEPA Handbook Section 4 describes the nonproject review concept as follows:

> Nonproject review allows agencies to consider the "big picture" by conducting comprehensive analysis, addressing cumulative impacts, possible alternatives, and mitigation measures. This has become increasingly important in recent years for several reasons:
>
> Provides the basis for future project decisions: Environmental analysis at the nonproject stage forms the basis for later project review, providing greater predictability.
>
> Expedites project analysis and decisions: The more detailed and complete the environmental analysis during the nonproject stage, the less review needed during project review. Project review is able to focus on only those environmental issues not adequately addressed during the nonproject stage.

Nonproject review does not defer all environmental review to some future date. SEPA Handbook Section 4.1 states:

> If the nonproject action is a comprehensive plan or similar proposal that will govern future project development, the probable impacts need to be considered of the future development that would be allowed. For example, environmental analysis of a zone designation should analyze the likely impacts of the development allowed within that zone. The more specific the analysis at this point, the less environmental review needed when a project permit application is submitted.

The FPEIS does not meet the above expectations. It defers all environmental analysis to the future rather than addressing the "big picture" before the decision to change the land use designation and zoning is made. Thus, the FPEIS is inadequate as a matter of law.

15. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact, Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner **GRANTS** the Anderson *et al.* appeal under File Number AP2012-01: The FPEIS for the East Monroe Comprehensive Plan Amendment is inadequate as a matter of law.

Revised Decision effective August 8, 2012.

\s\ John E. Galt (Signed original in official file)
John E. Galt
Hearing Examiner

Mailed/Issued: August 9, 2012

HEARING PARTICIPANTS [9]

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NOTICE of RIGHT of APPEAL

This Revised Decision, together with the Examiner's companion Order Granting Reconsideration in Part, is the Examiner's final decision. Further review may be sought pursuant to the provisions of applicable state law and local ordinance, including without limitation Chapter 43.21C RCW, WAC 197-11-680, and MMC 20.04.210 and 21.60.030.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."

[9] The official Parties of Record register is maintained by the City's Hearing Clerk.